

Message Text

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DRAFTED BY TREASURY:MFIELDS:COPYRIGHT OFFICE:PLYONS:

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L/EB:GLEHNER

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E.O. 11652: N/A

TAGS:EIND

SUBJECT: USG OBSERVATIONS ON DRAFT TEXTS FOR THIRD COMMITTEE
OF GOVERNMENTAL EXPERTS ON THE DOUBLE TAXATION OF COPY-
RIGHT ROYALTIES

1. IN RESPONSE TO REQUEST OF UNESCO AND THE WORLD
INTELLECTUAL PROPERTY ORGANIZATION (WIPO) (DG/6/8/23,
DATED FEBRUARY 23, 1978), FOLLOWING ARE USG COMMENTS ON
"PRELIMINARY DRAFT-MULTILATERAL AGREEMENT FOR THE
ELIMINATING OF DOUBLE TAXATION OF COPYRIGHT ROYALTIES"
AND "PRELIMINARY DRAFT PROTOCOL ANNEXED TO THE MULTI-
LATERAL AGREEMENT FOR THE ELIMINATION OF DOUBLE TAXATION
OF COPYRIGHT..."

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QUOTE: THE USG APPRECIATES THE EXTENSIVE WORK DONE BY THE
SECRETARIAT IN PREPARING AND DISTRIBUTING THESE DRAFTS IN
TIME FOR REVIEW PRIOR TO THE MEETINGS.

GIVEN THE LENGTH AND TECHNICAL COMPLEXITY OF THE DOCUMENTS,
WE HAVE A NUMBER OF COMMENTS ON PARTICULAR POINTS OF THE
DRAFTS WHICH THE USDEL WILL MAKE DURING THE JUNE

MEETINGS. WE ALSO HAVE A FEW GENERAL OBSERVATIONS AND SUGGESTIONS, WHICH ARE EXPLAINED BELOW.

(1) THROUGHOUT THE DOCUMENTS THE STATEMENT RECURS THAT DOUBLE TAXATION OFTEN CANNOT BE AVOIDED BUT SHOULD AT LEAST BE LIMITED. THIS IS NOT ENTIRELY ACCURATE. ALTHOUGH DOUBLE TAXATION IS MOST CLEARLY AVOIDED IF ONE COUNTRY EXEMPTS THE INCOME FROM TAX, IT IS ALSO AVOIDED IF THE TWO COUNTRIES SHARE THE TAX BY MEANS OF A CREDIT AGAINST THE RESIDENCE COUNTRY'S TAX FOR THE TAX PAID TO THE SOURCE COUNTRY. IN THAT EVENT, THE TAX DUE IS THE HIGHER OF THE TWO TAXES BUT NOT BOTH. DOUBLE TAXATION CAN BE AVOIDED WITHOUT A TREATY BY UNILATERAL MEASURES. BUT IN ANY EVENT A CENTRAL FEATURE OF A TREATY TO AVOID DOUBLE TAXATION IS TO ASSURE THAT ONE OR THE OTHER METHOD OF AVOIDING DOUBLE TAXATION (EXEMPTION OR CREDIT) WILL BE APPLIED.

(2) THE DIVISION OF THE TWO PARTS, THE MULTILATERAL STATEMENT OF PRINCIPLES, AND THE BILATERAL MODEL, DEPARTS IN SOME RESPECTS FROM THE RESOLUTION ADOPTED BY THE SECOND COMMITTEE OF GOVERNMENTAL EXPERTS. THE "PRINCIPLES" SECTION NOW CONTAINS DEFINITIONS AND IMPLEMENTING RULES WHICH WOULD SEEM TO FIT BETTER IN THE BILATERAL MODEL WHERE OTHER TERMS ARE DEFINED; AND ON THE OTHER HAND IT IS WEAK IN PRINCIPLES. FOR EXAMPLE, NO MENTION IS MADE OF THE PRINCIPLE OF AVOIDING DOUBLE TAXATION. MOREOVER, THE UNCLASSIFIED

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DRAFT MULTILATERAL AGREEMENT APPEARS TO BE CAST IN THE FORM OF A "CONVENTION", WHEN NO DECISION IN THIS RESPECT HAS BEEN MADE.

IN OUR VIEW IT IS INAPPROPRIATE FOR THE PRESENT DRAFT, WHICH IS PRIMARILY A STATEMENT OF GENERAL PRINCIPLES, TO BE CONCLUDED AS A CONVENTION. WE BELIEVE THE MORE APPROPRIATE FORM WOULD BE ALONG THE LINES OF A "RECOMMENDATION TO MEMBER STATES".

(3) THE PROPOSED MULTILATERAL INSTRUMENT SHOULD SET FORTH AND ELABORATE ON THE POINTS OF COMMON AGREEMENT. THESE INCLUDE THE AIMS OF AVOIDING DOUBLE TAXATION, OF MINIMIZING THE TAX BURDEN FOR AUTHORS, AND OF ACHIEVING AN EQUITABLE SHARING OF REVENUES; AN ACKNOWLEDGEMENT THAT THERE ARE VARIOUS WAYS OF ACHIEVING THESE OBJECTIVES (TAXATION AT RESIDENCE VS. TAXATION AT SOURCE, EXEMPTION VS. CREDIT); AND AN AGREEMENT BY THE PARTICIPATING COUNTRIES TO SEEK SOLUTIONS, WITH ALTERNATIVE RECOMMENDED SOLUTIONS SET FORTH IN THE ATTACHED MODEL BILATERAL TREATY.

(4) RATHER THAN ATTEMPTING TO DEFINE WITH ANY PRECISION THE TERM "COPYRIGHT ROYALTIES" IN THE MULTILATERAL INSTRUMENT, IT WOULD BE PREFERABLE TO INCLUDE A GENERAL REFERENCE TO THAT TERM. SINCE NOT ALL STATES ARE PARTY TO EITHER THE UNIVERSAL COPYRIGHT CONVENTION OR THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, IT DOES NOT SEEM POSSIBLE IN A STATEMENT OF GENERAL PRINCIPLES TO DRAFT A DETAILED DEFINITION OF THE TERM APPLICABLE IN ALL CASES.

(5) COMMENTS ON THE BILATERAL MODEL:

A) THE DEFINITIONS IN ARTICLE III SHOULD INCLUDE A DEFINITION OF THE TWO CONTRACTING STATES, SO THAT IT IS UNCLASSIFIED

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CLEAR WHICH RESIDENTS ARE ENTITLED TO THE TREATY BENEFITS. THIS IS ESPECIALLY IMPORTANT WHEN THE NATIONAL TAXING JURISDICTION INCLUDES OVERSEAS PROVINCES OR TERRITORIES, OR WHEN AN ADDRESS SYSTEM IS USED TO APPLY REDUCED RATES AT THE SOURCE.

B) AS THE RESOLUTION ADOPTED BY THE SECOND COMMITTEE OF GOVERNMENTAL EXPERTS PROVIDES FOR THE DRAFTING OF SEVERAL ALTERNATIVE VERSIONS OF CERTAIN PROVISIONS OF THE BILATERAL MODEL, IT APPEARS USEFUL TO ALLOW GREATER FLEXIBILITY IN THE DEFINITION OF "COPYRIGHT ROYALTIES". DIFFERENT APPROACHES TO THE DEFINITION OF THE TERM COULD BE SET FORTH IN THE ALTERNATIVE. STATES USING THE BILATERAL MODEL COULD THEN SELECT THE VERSION THAT BEST SUITED THEIR INDIVIDUAL SITUATION. PROVISION FOR THE "DROIT DE SUITE" SHOULD DEFINITELY BE OPTIONAL, AS WELL AS ANY REFERENCE TO PAYMENTS RECEIVED IN CONNECTION WITH THE RENTAL, LEASE OR LENDING OF THE MATERIAL OBJECT IN WHICH A MOTION PICTURE SUBJECT TO COPYRIGHT IS EMBODIED.

C) PERHAPS THE PERMANENT ESTABLISHMENT DEFINITION (ARTICLE V) IS UNNECESSARY. THIS IS SOMETHING FOR THE COMMITTEE TO CONSIDER.

D) IF TAXES COVERED ARE TO INCLUDE INDIRECT TAXES, SUCH AS SALES TAXES, THEN RULES MUST BE ADDED FOR AVOIDING DOUBLE TAXATION WITH RESPECT TO SUCH TAXES, PRESUMABLY BY EXEMPTION AT SOURCE.

E) SIMILARLY, ARTICLES VI AND VII SHOULD APPLY ONLY TO INCOME TAXES, AND A NEW ARTICLE SHOULD GOVERN OTHER TAXES.

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F) WE CONCUR WITH THE VIEW EXPRESSED IN THE COMMENTARY ON ARTICLE VI (PARAGRAPH 102 OF THE COMMENTARY) THAT THE TERM "NORMAL, INTRINSIC VALUE" IS VAGUE AND MAY GIVE RISE TO DISPUTES. WE SUGGEST, THEREFORE, THAT THE INTENT EXPRESSED IN THE COMMENTARY TO MAKE OPTIONAL PARAGRAPH 4 OF ARTICLE VI A AND PARAGRAPH 5 OF ARTICLES VI B AND C BE

STATED EXPLICITLY IN THOSE ARTICLES BY PROVIDING ALTERNATIVE FORMULATIONS. ONE FORMULATION WOULD BE THE PARAGRAPHS AS THEY NOW APPEAR AND THE OTHER WOULD BE THE LANGUAGE OF PARAGRAPH 4 OF ARTICLE 12 OF THE OECD MODEL DRAFT. END QUOTE.

2. ACTION: MISSIONS ARE REQUESTED TO FORWARD THESE OBSERVATIONS SOONEST TO RESPECTIVE SECRETARIATS OF UNESCO AND WIPO. CHRISTOPHER

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Enclosure: n/a
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